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In the

Supreme Court of the United States

No. [redacted] 38
1964

CITY OF EL PASO,

Appellant,

v.

GREENBERRY SIMMONS,

Appellee.

JURISDICTIONAL STATEMENT

for Appeal from the United States Court of Appeals for the Fifth Circuit

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No.

CITY OF EL PASO, *Appellant*,

v.

GREENBERRY SIMMONS, *Appellee*.

JURISDICTIONAL STATEMENT

Appellant submits herewith its Jurisdictional Statement and would respectfully show the Court the following:

A. OPINION BELOW

The decision appealed from is reported in Volume 320 Federal Reports 2d Series, Pages 541-545. A copy of said decision appears in the Appendix, Beginning at page A-1.

B. STATEMENT OF JURISDICTION

Suit was instituted by Appellee, Greenberry Simmons, to quiet title to two parcels of land located in El Paso County, Texas. Federal jurisdiction is based on 28 U.S.C.A. §1332. The trial court sustained Appellant's motion for summary judgment; however, the United States Court of Appeals for

the Fifth Circuit, by decision dated July 18, 1963, reversed and remanded the case. Appellant's petition for rehearing was denied by order dated August 29, 1963, and judgment was entered on the decision of the United States Court of Appeals on September 7, 1963. Notice of Appeal was filed in the United States Court of Appeals for the Fifth Circuit on November 27, 1963. Appellant applied for, and by order dated February 15, 1964, was granted a thirty day extension within which to docket its appeal and file a jurisdictional statement. This appeal is taken pursuant to 28 U.S.C.A. §1254 (2). *Cf. City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77; 78 S. Ct. 1063 (1958).

C. STATUTES INVOLVED

The decision of the United States Court of Appeals for the Fifth Circuit held that *Article 5326 of Vernon's Annotated Texas Statutes*, quoted below, impaired the obligation of a contract between the State of Texas and Appellee's predecessors contrary to Article I, Section 10 of the United States Constitution.

Article 5326 provides as follows:

> "If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for non-

payment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims reinstated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture. In case there is an outstanding valid grazing lease which would prevent re-instatement within the time prescribed by this Act, then such claim may be reinstated within sixty (60) days after the expiration of such grazing lease, provided application for reinstatement shall have been filed in the General Land Office within the five-year period above prescribed, accompanied with payment of all interest due thereon. In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchaser; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land."

D. QUESTION PRESENTED

The land purchase contracts upon which Appellee's claim is based were forfeited by the State of Texas for non-pay-

ment of interest and were not reinstated within the five-year period required by *Article 5326*. The five-year limitation feature contained in the statute, however, was enacted subsequent to the time the land purchase contracts were entered into. The question therefore presented by this appeal is whether the application of the five-year limitation provision of *Article 5326* to Appellee's land purchase contracts is repugnant to Article I, Section 10 of the United States Constitution.

E. STATEMENT OF THE CASE

Appellee's predecessors entered into purchase agreements with the State of Texas in 1910 (R. 43, 67). The Texas statute in effect in 1910 provided that a forfeited land purchase contract could be reinstated by payment of all back interest, provided that the rights of no third party had intervened. See *Article 4218f*, quoted in the Appendix beginning on page A-8. *Article 4218f*, from which *Article 5326* was derived, was amended in 1941, to provide that the privilege of reinstatement must be exercised within five years from the date of forfeiture. The land purchase contracts in question provide essentially that the purchaser will pay a certain specified sum to the State of Texas and upon payment in full, the State will issue a patent covering the land. On July 21, 1947, the purchase contracts were forfeited for failure to pay interest. Appellee, via quitclaim deeds dated June 10, 1952, acquired the vendees' right, title and interest in and to the lands in question. Apparently Appellee in the latter part of July, 1952, filed an appli-

cation for reinstatement pursuant to *Article 5326*. (R. 120, 121); however, since the application was not filed within the five-year period required by *Article 5326*, it was rejected. Thereafter, the lands in question were, on November 15, 1955, awarded to Appellant pursuant to Senate Bill 295, Acts of the 54th Legislature, Ch. 278, 1955, which Act appears in the Appendix hereof beginning on page A-9. Appellant paid the full purchase price and on January 16, 1956, received patents from the State of Texas. On August 31, 1961, Appellee instituted this action. As stated above, the trial court awarded Appellant summary judgment, but the decision was reversed by the United States Court of Appeals for the Fifth Circuit.

This appeal presents a substantial question in constitutional law. The statute which the United States Court of Appeals struck down has been in effect in the State of Texas since 1941. Consequently, numerous land titles in Texas will become questionable if the decision of the Court of Appeals is permitted to stand. It is common knowledge that the State of Texas no longer sells its lands. Therefore, there is little likelihood that rights of third parties will intervene in forfeited land purchase contract situations as contemplated by *Article 4218f*. The decision of the United States Court of Appeals permits purchasers in situations similar to Appellees to sit back aand pay absolutely nothing on their purchase contracts, pay no ad valorem taxes, and wait until the lands have increased in value through someone else's effort and then decide whether to reinstate their purchases. Since no sales of land are being made, there is

no possibility of intervening rights and the privilege of reinstating thereby becomes perpetual. In all probability this is the exact reason why the limitation feature was inserted in *Article 5326*.

The five-year limitation feature of *Article 5326* is merely a method by which the State of Texas rescinds forfeited land purchase contracts and pertains only to the State's remedy in case of default. This Court has had occasion to determine the obligation imposed in a State of Texas land purchase contract identical to the one under which Appellee is claiming. *Wilson v. Standifer*, 184 U.S. 399 (1902); and *Waggoner v. Flack*, 188 U.S. 595 (1903). The cases referred to are explicit insofar as the obligations imposed by a State of Texas land purchase contract are concerned. They state without qualification that the purchaser's obligation is to pay the purchase price and that the State's obligation is to issue a patent whenever the purchaser's obligation has been performed. These cases are equally explicit in stating that the remedy or means by which the State enforces or terminates the contract may, within the limits prescribed by the Constitution, be modified from time to time.

Another case in point is that of *Aikin v. Kingsbury*, 247 U.S. 484 (1918). The *Kingsbury* case involved a land purchase contract situation similar to Appellee's and this Court stated at page 487:

> "The right of the State to foreclose such a contract for default in payment, and the right of the purchaser to redeem after a default decree relate to the remedy

as distinguished from the obligation of the contract * * *"

F. CONCLUSION

Based on the foregoing, Appellant respectfully submits that the Honorable Supreme Court should allow this appeal.

Respectfully submitted

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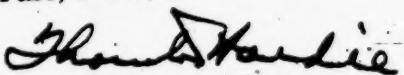
By 
Attorneys for Appellant.

PROOF OF SERVICE

I, William J. Mounce of Hardie, Grambling, Sims & Galatzan, attorneys of record for the City of El Paso, Appellant herein, depose and say that on the 24th day of February, 1964, I served a copy of the foregoing Jurisdictional Statement for Appeal From the United States Court of Appeals for the Fifth Circuit on Greenberry Simmons, Appellee herein, by mailing, air mail postage prepaid, a copy of same to Mr. Greenberry Simmons, Attorney at Law, Kentucky Home Life Building, Louisville, Kentucky and by mailing a copy of said Jurisdictional Statement to Mr. Harold Long, Attorney at Law, El Paso National Bank Building, El Paso, Texas, attorney for Greenberry Simmons.

Wm J. Mounce

WILLIAM J. MOUNCE

SUBSCRIBED AND SWORN TO before me at El Paso, Texas, this 24th day of February, 1964.

Alicia Lee

Notary Public, El Paso County, Texas

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19754

GREENBERRY SIMMONS, *Appellant,*

v.

CITY OF EL PASO, *Appellee.*

Appeal from the United States District Court for the Western District of Texas.

(July 18, 1963)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Federal jurisdiction in this action was asserted on diversity of citizenship and under 28 U.S.C.A. §1655. It is difficult to see how Section 1655 has anything to do with jurisdiction in this case but since diversity of citizenship and the jurisdictional amount of a matter in controversy are present, the question need not be considered.

Predecessors of title of the appellant, Greenberry Simmons, on January 25, 1910, made written applications to purchase land in El Paso County, Texas, from the State of Texas, reciting in the applications that they were made "under the provisions of Chapter 47, Act of 1895, Chapter 129, Act of May 19, 1897, and other Texas statutes." The obligations of the applicants, who became purchasers of the lands, required the annual payment of one-fortieth of the principal and interest at three per cent. The obligations, accepted by the Texas Land Commissioner, recited the purchase of the described land "in accordance with the provisions of" the foregoing statutes of Texas.

The 1897 statute to which reference was made in the title instruments contained a provision that,

> "In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." Texas Act, 1897, Ch. 197.

In 1941, the Texas Legislature reaffirmed the right to reinstate a contract of purchase after a forfeiture but imposed a five-year limitation period upon the exercise of the right with respect to forfeitures thereafter occurring. In the act it was provided:

> "In any case where lands may hereafter be forfeited to the State for non-payment of interest, the pur-

chasers, or their vendees, heirs, or legal representatives, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened. The right to reinstate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture, and the right to reinstate any claim heretofore forfeited by the Commissioner must be exercised within five (5) years from the effective date of this Act, but not thereafter." Texas Acts 1941, Ch. 191.

In 1951 this statute was amended but not, apparently, in any particular which is here pertinent. Texas Acts 1951, Ch. 59.

On July 21, 1947, the land was forfeited to the State for non-payment of interest. On July 23, 1952, the land Commissioner of the State of Texas received from the appellant, who was the mesne grantee of the original purchasers, applications to reinstate the claims to the lands, with checks for the unpaid interest. On July 24, 1952, the Land Commissioner returned the applications and checks to the appellant with a letter in which it was said:

> "With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

"In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23."

On May 23, 1955, the Texas Legislature authorized the sale to the City of El Paso of fourteen thousand acres of land in El Paso County, including the lands claimed by the appellant. The lands were patented to the appellee City on January 26, 1956. Another statute of the State of Texas, enacted in 1921, contained a provision that "No sale made without condition of settlement shall be questioned by the State or any person after one year from the date of such sale." Vernon's Ann. Tex. Stat. Art. 5329. The appellant brought an action in the nature of trespass to try title on August 31, 1961. The City asserted by defenses, the limitation of the 1941 and 1951 statutes, the bar of Article 5329, adverse possession, and that intervening rights and lapse of time had resulted in the appellant's claim being barred by laches. Both parties filed motions for summary judgment. The motion of the defendant was granted and judgment was entered that the appellant take nothing. From that judgment this appeal has been taken.

Although other issues are made by the claim asserted in the complaint and the defense set out in the answer, only two of these require present consideration. First, we must decide whether Article 5329 cut off the right of the appellant to question the validity of the sale to the City of El Paso. If this statute does not bar the appellant,

then we must ascertain whether the statutes of 1941 and 1951 work an impairment of the obligation of the contract of purchase with the result that the tender of the delinquent payments before any intervening rights arose reinstated the contract. As to the first of these questions, it would seem that if the application for reinstatement and tender of the delinquent interest made by the appellant were valid and effective so as to restore the rights which had been forfeited, the sale to the City of El Paso would have been illegally made and void. Statutes relieving from forfeiture are to be liberally construed in favor of the owner. The one-year limitation provisions would not be applicable if a reinstatement had been effected before the subsequent attempt to sell. *Davis v. Yates*, 63 Tex. Civ. App. 6, 133 S.W. 281. Se also *Lovett v. Simmons*, Tex. Comm. App. 29 S.W. 2d 1021; *Herndon v. Robinson*, Tex. Comm. App. 114 Tex. 446, 270 S.W. 159. We are then required to determine the second question.

It is said that "The books disclose numerous disputes which have arisen where land (in Texas), having been awarded to one person, thereafter was forfeited and awarded to another, the claim of the earlier purchaser depending upon the showing as to whether he was entitled to be reinstated to his rights under his contract of purchase." 34 Tex. Jur. 190, Public Lands §129. The contract between the appellant's predecessor in title and the State was made pursuant to the statute, and the provisions of the statute became terms of the contract. *Indiana ex rel Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 433, 82 L. Ed. 685, 113 A.L.R.

1482, reh. den. 303 U.S. 667, 58 S. Ct. 641, 82 L. Ed. 1123. See also *Dodge v. Board of Education*, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57; *Hall v. Wisconsin*, 103 U.S. 5, 26 L. Ed. 302.

The United States Constitution provides that "No state shall * * * pass * * * any law impairing the obligation of contracts." U. S. Const., Art. I, Sec. 10. A Court of Civil Appeals of Texas has held that this constitutional provision "is violated whenever there is any invasion of the effect of the asserted contract in however small a particular, and it is not required that the contract be entirely or even materially impinged upon." *Simpson v. Pontotoc Common County Line School District*, Tex. Civ. App. 275 S.W. 449.

It is the obligation of the contract that is not to be impaired. A statute which merely changes the remedy does not, as a general rule, impair the obligation. *Aikens v. Kingsbury*, 247 U.S. 484, 38 S. Ct. 558, 62 L. Ed. 1226. Statutes of limitation refer to the remedy and not to the obligation of a contract and hence do not fall within the constitutional inhibition of statutes impairing the obligation of contracts. *Sturges v. Crowinshield*, 4 Wheat. 122, 4 L. Ed. 529. The statutory provision, forming a part of the contract, gave to the contract purchaser a right to reinstate his contract at any time before the rights of third persons intervened. This right of reinstatement was in the nature of a continuing option which the State could terminate only by the creation of a right in another. A Texas Court of Civil Appeals has declared that, "It is our duty to construe these laws so as to alleviate against the rigors of forfeiture, for

the law abhors a forfeiture." *State v. Walden*, Tex. Civ. App. 325 S.W. 2d 705. See also *Gulf Production Co. v. State*, Tex. Civ. App. 231 S.W. 124.

In construing the statutory language providing for reinstatement after forfeiture, it was held in the case last cited that the statute was embraced in the contract when it was entered into, and neither the state nor the purchaser could arbitrarily and without the consent of the other write into the contract any provision or condition varying, restricting or enlarging the terms of the contract; and, the payment of the delinquent interest before the intervention of rights of a third party being the only condition to reinstatement, the state could not impose a different or additional condition. 231 S.W. 124, 131. The right of reinstatement is a vested right which is entitled to protection of constitutional guarantees. See *Anderson v. Neighbors*, 94 Tex. 236. 59 S.W. 543. The statute, in force when the purchase was made, which gave to the purchaser a right to redeem from forfeiture, was not one dealing with a remedy, but on the contrary created an obligation of the state to reinstate the contract if payment was made before the intervention of the rights of others. The state could not impair this right, as it attempted to do by the 1941 and 1951 Acts. Cf. *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701. The tender made by the appellant, assuming it has been or will be kept good, reinstated the contract.

The district court did not consider the defenses of adverse possession and laches. If sustained by the preponderance

of evidence one or more of these defenses might defeat the appellant's claim. Therefore a remand is required for the trial of these issues.

REVERSED AND REMANDED.

Article 4218f. When any portion of said land has been classified to the satisfaction of the commissioner of the general land office, under the provisions of this chapter or former laws, such lands shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have

resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30th, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. In any cases where lands have been forfeited to the State for non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.

Senate Bill 295, Acts of the 54th Legislature, Chapter 278, 1955.

Section 1. The Commissioner of the General Land Office is hereby authorized to sell to the City of El Paso, El Paso County, Texas, for a total consideration based on the aggregate fair and reasonable market value of said land, but no less than $6.50 per acre, as determined by two appraisers appointed by the Commissioner of the General Land Office

of Texas, the following described Public School Lands situated in El Paso County, and described as follows, to-wit:

(AMONG OTHER LANDS)

N½ of Section 240
N. D. Mundy Survey
Containing 328.65 acres

Section 235
L. E. Mundy Survey
Containing 292 acres

and aggregating 14,000.15 acres. Said lands shall be sold upon the filing in the General Land Office of an application to purchase by the proper authority of the City of El Paso accompanied by payment of the full consideration herein provided. Such sale shall be subject to any right-of-way easements, surface leases, or any oil, gas mineral leases or permits theretofore given by the State on said lands. All Mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said board or agency for the prevention of pollution and contamination of the fresh waters in, on and under said lands.

Section 2. Upon payment of the purchase money provided herein, payments of fees required by law, and the filing in the General Land Office of any field notes or corrected field notes required by the Commissioner of the General Land Office, patents shall be issued to the City of El Paso containing the reservations provided for in Section 1 of this Act.

Section 3. The fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled creates an emergency and an imperative public necessity that the Constitutional Rule that each bill be read on three separate days in each House be suspended, and such Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.